KEJUTAAN HOLDINGS SDN BHD A

v.

MAGNUM 4D (PERAK) SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM FCJ
AHMAD MAAROP JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-320-2008]
26 MAY 2009 C

COMPANY LAW: *Oppression - Oppression of minority - Whether dependent on the facts and circumstances of each case - Steps taken by holding company to protect subsidiary from possible suits - Steps taken by holding company to protect interests of subsidiary's shareholders - No malicious intent exhibited by holding company - Whether such steps constituted oppression or unfairness to minority shareholders - Companies Act 1965, s. 181* D

CONTRACT: *Terms - Construction of - Sanctity of contract, doctrine of - Whether court empowered to interfere with contractual relations lawfully established* E

The appellant was a minority shareholder of the 1st respondent. The 2nd respondent was the majority shareholder of the 1st respondent. The 2nd respondent was solely controlled by the 8th F respondent, whose majority shareholder was the 9th respondent. The 4th, 5th, 6th and 7th respondents were directors of the 1st respondent. The 9th respondent was licensed to conduct gaming business throughout Malaysia. It conducted its business through area agents in each State. Each area agent had to execute an area G agency agreement ('the agreement') with the 9th respondent relating to the conduct of business and commissions payable to the 9th respondent. The area agents would then appoint their own selling agents who executed agreements concerning commissions payable. The 1st respondent was a Perak area agent H of the 9th respondent, appointed under an agreement. In 2002, a dispute arose between a selling agent and an area agent for the state of Selangor. The dispute was referred to arbitration and by an award dated 16 August 2002, the arbitrator not only ruled in favour of the selling agent, but went on to decide that the 9th I respondent was only entitled to 4% commission under the agency

agreement rather than the 25.43% that had been paid to the 9th respondent throughout the years. An EGM of the 1st respondent held on 24 June 2003 following the publication of the award, passed several resolutions, *inter alia* that the award which ruled only 4% commission payable to the 9th respondent was not reflective of the true position between the 9th respondent and the 1st respondent; and that the 1st respondent confirmed that the commission payable to the 9th respondent was in fact 25.43%. Subsequently, the 9th respondent through its subsidiaries encouraged the selling agents in Perak to move away from the 1st respondent and enter into fresh arrangements with a new company – French Development Sdn Bhd ('Newco'). The selling agents were offered a higher rate of commission than under the agreement they each had with the 1st respondent. The core business of the 1st respondent thereafter ceased to exist. The 9th respondent then terminated the area agency agreement it had with the 1st respondent. The 9th respondent and its subsidiaries offered to buy out the appellant's shares in the 1st respondent but nothing came out of the discussions between the parties. The appellant subsequently filed a petition pursuant to s. 181 of the Companies Act 1965 against the respondents in respect of alleged acts of oppression and/or prejudicial conduct on the part of the 2nd to 9th respondents. The petition was dismissed by the High Court and the appellant appealed to the Court of Appeal, contending that: (i) the 4th to 7th respondents being directors of the 1st respondent had failed to disclose at the EGM the potential claim the 1st respondent had against the 9th respondent for the overpayment of commission in view of the arbitration award that the 9th respondent was only entitled to 4% commission; (ii) the 9th respondent and its associates had unfairly taken away the business of the 1st respondent leaving it to 'starve'; and (iii) the 9th respondent had terminated the area agency agreement without cause.

Held (dismissing the appeal with costs)

Per Gopal Sri Ram FCJ delivering judgment of the court:

(1) The area agency agreement was a perfectly valid document. It was not the appellant's case that the area agency agreement was in itself an act of oppression or that it had been used as an instrument of oppression. The agreement was always there to be enforced. It was never a term of the area agency agreement that the commission could be reduced to 4 per

cent by an external act, that is to say, an event dehors (out of) the contract. To suggest that the arbitration award of 16 August 2002 had any impact on the rate of commission payable by the 1st respondent to the 9th respondent was a *non sequitur*. It is a well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreements must adhere to their terms. The law does not permit excuse from performance save in very rare instances. There is no power in any court to interfere with contractual relations lawfully established or to cancel obligations voluntarily assumed. This was not a case where the court, empowered by the Companies Act 1965 could intervene and cancel a transaction found to be oppressive. There was no duty upon any of the directors of the 1st respondent or upon the 9th respondent to advise the shareholders of the 1st respondent in the way in which it was said they ought to have been advised. (paras 7 & 8)

(2) Whether a holding company has conducted the affairs of its subsidiary having independent minority shareholders fairly depends on the facts and circumstances of each case. In the instant case, the arbitration award of 16 August 2002 had caused alarm. As a matter of commercial reality, the 1st respondent had to be protected from possible suits. It was also necessary to insulate the interests of the shareholders from a serious loss of the capital fund of the 1st respondent. Clearly, there was no malicious intent on the part of the 9th respondent to denude the 1st respondent of its business. The steps taken by the relevant respondents, in particular the 9th respondent, were with the object of protecting the interests of the 1st respondent and its shareholders. Further, the shareholders in the 1st respondent were offered shares in Newco but the appellant declined the offer. There was also the offer to buy out the appellant. Considering the relevant facts and circumstances, there was no intention to harm the 1st respondent or its shareholders. *Scottish Co-operative Wholesale Society Ltd v. Meyer* (dist); *Re Kong Thai Sawmill (Miri) Sdn Bhd* (refd); *Re Tivoli Freeholds Ltd.* (refd) (paras 9, 10, 11 & 12)

(3) In the instant case, once Newco had been established and the 1st respondent completely insulated, the purpose of the area agency agreement ceased to exist. Its termination was a mere consequence of the restructure that had already been set

in motion following the EGM of 24 June 2003. Further, it was not correct to say that the 1st respondent was not acting in breach of the area agency agreement. In reality, what the appellant wanted was a revisit of cl. 11 (pertaining to payment of commission to the 9th respondent) by the 1st respondent. This amounted to a violation of the terms of the area agency agreement. (para 13)

(4) Based on the totality of the evidence presented to the High Court, a reasonable tribunal properly directing itself would not have concluded that there was oppression or oppressive conduct against the appellant. The appellant's case advanced in the High Court fell far short of the standard required by the authorities. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah pemegang saham minoriti responden pertama, sementara responden ke 2 adalah pemegang saham majoritinya. Responden ke 2 dimiliki sepenuhnya oleh responden ke 8, di mana pemegang saham majoritinya adalah responden ke 9. Responden-responden ke 4, ke 5, ke 6 dan ke 7 adalah pengarah-pengarah responden pertama. Responden ke 9 mempunyai lesen untuk menjalankan urusniaga perjudian di seluruh Malaysia, dan menjalankannya melalui agen-agen daerah di setiap Negeri. Setiap agen daerah diwajibkan memeterai perjanjian agensi ('perjanjian') dengan responden ke 9 berhubung cara menguruskan perniagaan dan komisyen yang harus dibayar kepada responden ke 9. Agen-agen daerah kemudian akan melantik wakil-wakil penjual mereka sendiri, yang juga akan memeterai perjanjian mengenai komisyen-komisyen yang perlu dibayar. Responden pertama adalah agen daerah responden ke 9 di Perak yang dilantik di bawah perjanjian. Pada tahun 2002, satu pertikaian berbangkit di antara seorang wakil penjual dan seorang agen daerah di Selangor. Pertikaian itu dirujuk kepada timbangtara, dan melalui award bertarikh 16 Ogos 2002, penimbangtara bukan sahaja memutuskan dengan berpihak kepada wakil penjual, tetapi merumuskan selanjutnya bahawa responden ke 9 hanya berhak kepada 4% komisyen sahaja di bawah perjanjian agensi dan bukannya 25.43% seperti yang dibayar kepada responden ke 9 selama bertahun-tahun sebelumnya. EGM responden pertama yang diadakan pada 24 Jun 2003 ekoran penyiaran award tersebut telah meluluskan beberapa resolusi, antara lain, bahawa award yang memutuskan hanya 4% perlu

dibayar kepada responden ke 9 adalah tidak mencerminkan keadaan sebenar yang wujud di antara responden ke 9 dan responden pertama; dan bahawa responden pertama mengesahkan bahawa komisyen yang perlu dibayar kepada responden ke 9 adalah sememangnya 25.43%. Berikutnya, responden ke 9, melalui anak-anak syarikatnya menggalakkan wakil-wakil jualan di Perak supaya mengundur diri dari responden pertama dan memeterai perjanjian baru dengan sebuah syarikat baru – French Development Sdn Bhd ('Newco'). Berikutan itu wakil-wakil jualan ditawarkan kadar komisyen yang lebih tinggi berbanding dengan kadar yang diberi melalui perjanjian mereka dengan responden pertama, dan akibatnya, perniagaan teras responden pertama telah menjadi lumpuh. Responden ke 9 kemudian menamatkan perjanjian agensinya dengan responden pertama. Responden ke 9 dan anak-anak syarikatnya juga telah membuat tawaran untuk membeli saham-saham perayu di dalam responden pertama, namun tiada apa-apa keputusan dicapai mengenainya. Selepas itu, perayu memfailkan petisyen di bawah s.181 Akta Syarikat 1965 terhadap responden-responden dengan mendakwa telah berlaku perbuatan-perbuatan penindasan dan/atau perbuatan-perbuatan yang memprejudiskan perayu yang dilakukan oleh responden-responden ke 2 hingga ke 9. Petisyen ditolak oleh Mahkamah Tinggi. Perayu merayu ke Mahkamah Rayuan sambil berhujah bahawa: (i) responden-responden ke 4 hingga ke 7 selaku pengarah-pengarah responden pertama gagal mendedahkan di EGM mengenai tuntutan berpotensi terhadap responden ke 9 yang ada ditangan responden pertama berhubung pembayaran lebih komisyen, mengambilkira keputusan bahawa responden ke 9 hanya berhak kepada 4% komisyen sahaja; (ii) responden ke 9 dan sekutu-sekutunya telah meruntuhkan perniagaan responden pertama dan meninggalkannya 'merana kelaparan'; dan (iii) responden ke 9 telah menamatkan perjanjian agensi tanpa sebab.

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Tiada cacat celanya dengan perjanjian agensi daerah. Bukanlah menjadi kes perayu bahawa perjanjian agensi daerah itu sendiri adalah satu penindasan atau bahawa ianya digunakan sebagai satu alat untuk menindas. Perjanjian sentiasa ada ditangan mereka untuk dikuatkuasakan. Ianya juga bukan menjadi terma perjanjian agensi daerah bahawa komisyen boleh dikurangkan kepada 4% oleh suatu perbuatan luaran, yakni suatu peristiwa

di luar kontrak. Untuk mengatakan bahawa award timbangtara bertarikh 16 Ogos 2002 mempunyai apa-apa impak terhadap kadar komisyen yang kena dibayar oleh responden pertama hingga responden ke 9 adalah *non sequitur*. Sudah menjadi prinsip mantap yang didokong oleh doktrin kemurnian kontrak bahawa pihak-pihak yang berkontrak haruslah mematuhi terma-termanya. Undang-undang tidak memaafkan pelaksanaan kecuali dalam keadaan-keadaan yang sangat terhad. Tidak ada kuasa di sisi mana-mana mahkamah untuk mencampuri hubungan-hubungan kontraktual yang dimaktub secara sah atau untuk membatalkan obligasi-obligasi yang telah diterima secara sukarela. Ini bukanlah kes di mana mahkamah, setelah diberi kuasa oleh Akta Syarikat 1965, boleh campur tangan dan membatalkan suatu transaksi yang didapati menindas. Juga tiada kewajipan atas mana-mana pengarah responden pertama atau atas responden ke 9 untuk menasihati pemegang-pemegang saham responden pertama dengan cara sepertimana mereka dikatakan sepatutnya diberi nasihat.

(2) Sama ada sesebuah syarikat induk itu telah mengendalikan halehwal anak syarikatnya yang mempunyai pemegang-pemegang saham minoriti sendiri dengan secara adil akan bergantung kepada fakta dan halkeadaan sesuatu kes. Dalam kes semasa, award timbangtara bertarikh 16 Ogos 2002 telah mengecohkan keadaan. Dari segi realiti komersialnya, responden pertama harus dilindungi dari guaman-guaman yang mungkin difail terhadapnya. Adalah juga perlu untuk melindungi kepentingan pemegang-pemegang saham supaya tidak mengalami kerugian serius dalam dana modal responden pertama. Jelasnya, tiada niat jahat di pihak responden ke 9 untuk memusnahkan perniagaan responden pertama. Langkah-langkah yang diambil oleh responden-responden berkaitan, terutama responden ke 9, adalah dengan tujuan untuk melindungi kepentingan responden pertama dan pemegang-pemegang sahamnya. Selain itu, pemegang-pemegang saham di dalam responden pertama telah ditawarkan saham Newco namun ianya ditolak oleh perayu. Juga terdapat tawaran untuk membeli terus perayu. Mengambilkira fakta-fakta dan halkeadaan yang relevan, tidak ada niat untuk menjejaskan responden pertama atau pemegang-pemegang sahamnya. *Scottish Co-operative Wholesale Society Ltd v. Meyer* (dibezakan); *Re Kong Thai Sawmill (Miri) Sdn. Bhd* (dirujuk); *Re Tivoli Freeholds Ltd.* (dirujuk)

(3) Dalam kes semasa, sebaik Newco ditubuhkan dan responden pertama dilindungi sepenuhnya, perjanjian agensi daerah sudah tidak lagi mempunyai arah tujunya. Penamatannya hanyalah sebagai akibat biasa dari penstrukturan semula yang sudah pun dimulakan ekoran EGM bertarikh 24 Jun 2003. Selain itu, adalah tidak benar untuk menyatakan bahawa responden pertama tidak bertindak secara yang melanggar perjanjian agensi daerah. Pada hakikatnya, apa yang dikehendaki perayu adalah untuk melihat semula fasal 11 (berhubung pembayaran komisyen kepada responden ke 9) oleh responden pertama. Ini menyanggahi terma-terma perjanjian agensi daerah.

(4) Berdasarkan keseluruhan keterangan yang dikemukakan di Mahkamah Tinggi, suatu tribunal munasabah yang mengarahkan dirinya secara teratur tidak akan merumuskan bahawa terdapat penindasan atau perlakuan menindas terhadap perayu. Kes perayu yang dikemukakan di Mahkamah Tinggi jauh tidak mencapai standard yang diperlukan oleh autoriti-autoriti.

Case(s) referred to:
Scottish Co-operative Wholesale Society Ltd v. Meyer [1959] AC 324 ***(dist)***
Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 ***(refd)***
Re Tivoli Freeholds Ltd [1972] VR 445 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181

For the appellants - Dato' WSW Davidson (Wan Koon Meng & Y Ramachandran with him); M/s Azman Davidson & Co
For the 2nd & 8th respondents - Logan Sabapathy (Liew Pui Yee & Chay Chee Yon with him); M/s Logan Sabapathy & Co
For the 4th-7th respondents - S Nantha Balan (Norliza Rasool Khan with him); M/s Zul Rafique & Partners
For the 9th respondent - Dato' Cyrus Das (K Mohan & Navrita Kaur with him); M/s Shook Lin & Bok
For the 10th respondent - Lim Chee Wee (Ravneet Kaur with him); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Originating Petition No: D5-26-39-2004]

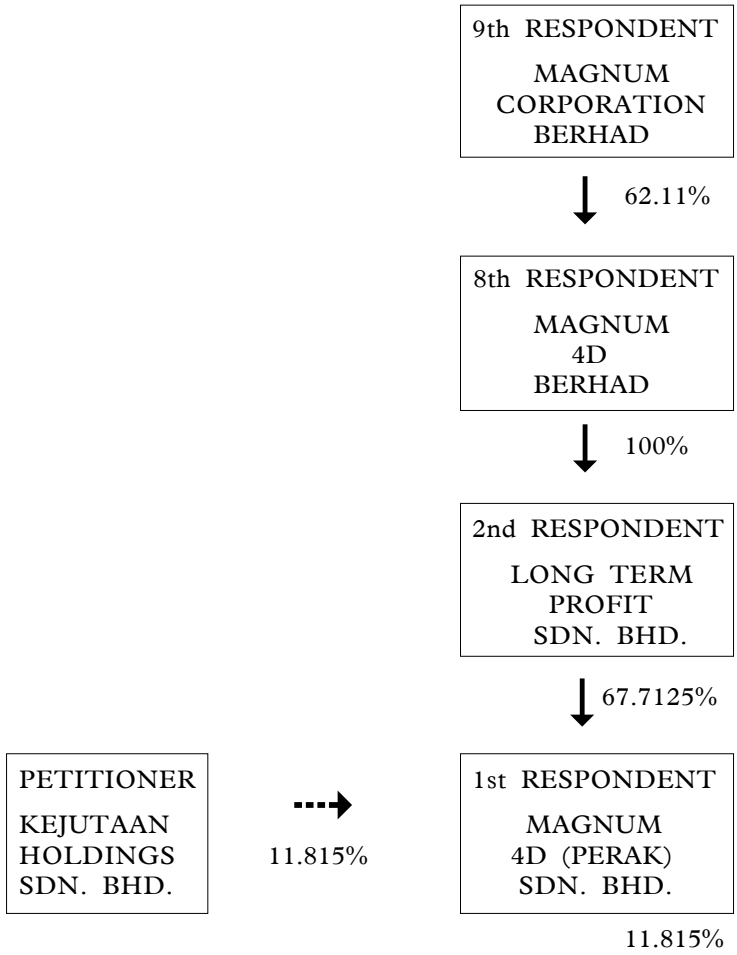
Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram FCJ:

[1] This is the judgment of the court.

[2] This appeal concerns a dispute between the shareholders of a company. The appellant's case is that it is the victim of conduct proscribed by s. 181 of the Companies Act 1965 ("the Act"). It unsuccessfully petitioned the High Court for relief under that section. It has now appealed to us. Before we narrate the facts relevant to the dispute, it is necessary to introduce the parties to these proceedings and describe how they are related to each other. Learned counsel for the appellant has put it in the form of a chart which we gratefully produce below.



[3] The appellant is a minority shareholder of Magnum 4D (Perak) Sdn. Bhd., the 1st respondent before us, which is merely a pro-forma party to these proceedings and is not represented. The 2nd respondent is the majority shareholder of the 1st respondent. It in turn is solely controlled by the 8th respondent. The 9th respondent is a majority shareholder of the 8th respondent. There are other minority shareholders in the 1st respondent, but they are not before us. The 4th, 5th, 6th and 7th respondents are directors of the 1st respondent. As for the 10th respondent, it is alleged that he is a shadow director of the 1st respondent. But it must be said at once that no material was placed before the High Court to support that charge and learned counsel for the appellant quite frankly did not pursue the point before us.

[4] The 9th respondent is a public-listed company. It is licensed to conduct gaming business throughout Malaysia. It is authorised to do this through agents. It appoints area agents – usually one area agent for each State. It enters into agreements with these area agents on the conduct of business and in respect of the commissions that they must pay it. The area agents then appoint selling agents and they have agreements with each of them as to the payment of commission. There is a formula. But it is not relevant for present purposes. The 1st respondent is an area agent. It conducts business in the State of Perak. It has an agreement with the 9th respondent. It is dated 21 April 1989 ("the area agency agreement"). Clause 11 of that agreement is important. This is what it says:

> **11. Commission**
>
> The Area Agent shall, subject to Clause 10, be entitled to retain seventy-three per centum (73%) of the net collection arising from the sale of Four-Digit Numbers Forecast tickets in the Area. The amount so retained by the Area Agent shall be used for the payment of prizes, telecommunications costs, materials provided in connection with the Ticketing Equipment commission of its Selling Agents and remuneration of its employees and all other expenses incurred in respect of the sale and operation of the Four-Digit Numbers Forecast betting in the Area and any balance thereof shall be deemed to be the consideration to the Area Agent for organizing the operation of Four-Digit Numbers Forecast betting

A in the Area. It is expressly agreed and provided that in the event of the said seventy-three per centum (73%) of the net collections being insufficient to pay the prizes, commissions, remunerations and other expenses of the Area Agent and its Selling Agents then the Area Agent shall pay the deficit sum out of its own funds and
B bear such loss. The Area Agent shall not be entitled in any event to claim such deficit or loss or any remuneration from the Licensee. The Area Agent shall account to the Licensee for all other monies in excess of the seventy-three (73%) per centum of the net collection arising from the sale of Four-Digit Numbers Forecast tickets.

C

It is further expressly agreed and provided that the percentage of the collection from the sale of Four-Digit Numbers Forecast tickets payable by the Licensee to the Area Agent aforesaid may at the absolute discretion of the Licensee be varied from time to time but in such event the Licensee shall give at least one (1)
D month's notice of such variation to the Area Agent before the variation shall become effective.

The expression 'net collection' shall mean the gross proceeds from the sale of tickets in the Area (subject to Clause 10) less the Gaming Tax imposed under the Gaming Tax Act (or any
E amendment or re-enactment thereof) in respect of Four-Digit Numbers Forecast.

[5] Everything appears to have gone on quite well for ten years. Then in 2002, a dispute arose between a selling agent in Selangor
F and the area agent for that State. It had to do with the amount of commission payable. That dispute was referred to an arbitrator. He handed down an award on 16 August 2002. He found for the selling agent. If it had been merely an interpretation of the agreement between the area agent and the selling agent, nothing
G perhaps would have come of it. But as it happened, the arbitrator without there being any representation before him by the 9th respondent, proceeded to interpret cl. 11 of the area agency agreement. The impact of the award was far-reaching. What the arbitrator appears to have held is that, having regard to the rate
H of the pool betting duty, the 9th respondent was only entitled to 4 per cent commission. That of course was quite wrong, because the area agency agreement which had remained unchallenged for more than ten years specifically provided for the commissions to be paid at the rate prescribed in cl. 11 earlier reproduced.
I Following the publication of the award, an extraordinary general meeting of the 1st respondent was called for. It was held on

24 June 2003. At that meeting, a letter dated 3 June 2003 from the 9th respondent to the 1st respondent was presented for discussion. The aim and object of the meeting was to reaffirm the percentage of commission payable according to cl. 11. All present at the meeting save for one minority shareholder who is not before us assented to the passing of the resolutions. The resolutions are in the following terms:

1. That it is the Company's position that the award against a State counterpart whereby it was ruled that the commission due to MCB is only 4% of net collection is not reflective of the true position between MCB and the Company.

2. That the Company confirms the true position and that the said commission is presently 25.43% from the net collection notwithstanding that the Pool Betting Duty rate was reduced from 12% to 6% with effect from 1st January 2003 and that the Agreement is restated accordingly (if at all necessary).

3. That without prejudice to any other necessary action to preserve a position as set out above, the Company shall correct the misconception amongst selling agents, both in writing and through meetings.

4. That Tan Sri Dato' Md Khir Johari and/or Mr. Tuen Foo Fat be and given full mandate to carry out the decisions of the General Meeting and all matters necessary and incidental thereto.

[6] As we have said, the impact of the arbitrator's award appears to have been quite far reaching. If he was right, then all selling agents in each state would have recourse against the respective area agents. That would expose the 1st respondent to a potential claim of about RM18 million. The 9th respondent was naturally concerned. Steps had to be taken, within reasonable limits, to insulate the 1st respondent from potential suits by the selling agents in Perak. Simultaneously, these selling agents had to be appeased and releases obtained from each of them waiving any claim they may have against the 1st respondent. And all this had to be done fairly quickly. Now, there is a company called French Development Sdn. Bhd. It was a shell company at the material time. We will refer to it as "Newco", because that is how parties before us have referred to it. What happened was this. The selling agents in Perak were offered a higher rate of commission than that prescribed by the agreement they had with the 1st respondent. Separate deeds of mutual revocation and release were

executed by them. But there was no assurance at the time that all the selling agents would agree to the course proposed. Some might object and insist on pursuing a claim against the 1st respondent. To meet this difficulty, the 9th respondent acting through its subsidiaries encouraged the selling agents to move away from the 1st respondent and enter into fresh arrangements with Newco. As it happened, all the selling agents agreed to the course proposed. The core business of the 1st respondent ceased to exist. The 9th respondent then terminated the area agency agreement it had with the 1st respondent. During this period of time, discussions took place between the 9th respondent's subsidiaries and the petitioner. These included proposals from the 9th respondent and/or its subsidiaries to buy out the petitioner's shares in the 1st respondent. However nothing came out of this. Later, on 14 May 2004 the appellant presented this petition seeking relief on the ground that it had been oppressed by the 2nd to 10th respondents.

[7] Three grounds of complaint were put forward as constituting oppression. First, that the 4th, 5th, 6th and 7th respondents being directors of the 1st respondent had failed to disclose to the meeting of 24 June 2003 of the potential claim that the 1st respondent may have had against the 9th respondent in respect of overpayment of commission. The argument here is that as a result of the award of 16 August 2002, it was found that the 1st respondent had overpaid sums by way of commission to the 9th respondent. The 1st respondent was entitled to recover these monies. The directors (the 4th, 5th, 6th and 7th respondents) were under duty to advise the meeting, in particular the minority shareholders present thereat, of this claim. They did not do so. Accordingly, they had acted in breach of the duties which they owed the minority shareholders.

[8] Now, we have heard very careful arguments advanced on this point before us for the best part of two days. And we are grateful to Dato' WSW Davidson, counsel for the appellant for having explained his client's case in very clear terms. However after anxious consideration, we are satisfied beyond any doubt that there is really nothing in this point. The area agency agreement is a perfectly valid document. During argument, we asked learned counsel for the appellant whether it is their case that the area agency agreement in question was in itself an act of

oppression or that it had been used as an instrument of oppression. He quite frankly said that that was not his case. So the agreement was always there to be enforced. And it was never a term of that area agency agreement that the commission could be reduced to 4 per cent by an external act, that is to say, an event dehors the contract. The only circumstance in which the rate of commission could be altered is provided by cl. 11 itself. And that is at the instance of the 9th respondent acting unilaterally. In our respectful view, to suggest that the award of 16 August 2002 had any impact on the rate of commission payable by the 1st respondent to the 9th respondent is a *non sequitur*. It is a well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreements must adhere to their terms. The law does not permit excuse from performance save in very rare instances. There is no power in any court to interfere with contractual relations lawfully established or to cancel obligations voluntarily assumed. Where, however, a limited company enters into a transaction which constitutes oppression upon one or more of its members, those making complaints may upon proof of oppression seek a cancellation or a setting aside of the transaction in question. The court is empowered by statute, that is to say, the Act, in those circumstances to intervene and cancel the transaction that is found to be oppressive. But that is not the case here. We accordingly hold that there was no duty upon any of the directors of the 1st respondent or indeed upon the 9th respondent to advise the shareholders of the 1st respondent in the way in which it is said they ought to have been advised.

[9] The second ground upon which oppression is said to have taken place is this. The 1st respondent's core business was the conduct of gaming activity through its selling agents. That was taken away from it and handed to Newco. In short, the 1st respondent was left to starve. It became a shell and utterly useless to its shareholders, in particular the appellant. Reliance was placed on the decision of the House of Lords in the leading case of *Scottish Co-operative Wholesale Society Ltd v. Meyer* [1959] AC 324. In that case, Viscount Simonds observed, which observation is to be found in the headnote of the case, as follows:

> When a subsidiary company is formed with an independent minority of shareholders, the parent company is under an obligation so to conduct its own affairs as to deal fairly with its subsidiary.

A In the course of his speech, Viscount Simonds described the conduct of the directors of the holding company in caustic terms. He said that the holding company had "doomed the company to destruction" and "was ruthless and unscrupulous in design".

B **[10]** No doubt *Scottish Co-operative Wholesale Society Ltd v. Meyer* is authority for the proposition that a holding company is under an obligation to conduct the affairs of its subsidiary having independent minority shareholders in a fair manner. But whether there has been a departure from fairness or, to borrow the C language of Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 MLJ 227, "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect" is a matter that depends on the peculiar facts and circumstances of each case. This is an area D in which decided cases provide broad guidelines only with a high degree of fact sensitivity: see *Re Tivoli Freeholds Ltd.* [1972] VR 445. To attempt a comparison of two fact patterns is neither helpful nor conclusive.

E **[11]** That brings us to the facts of the present instance. As we have already said, the arbitration award of 16 August 2002 set the cat among the pigeons. As a matter of commercial reality, the 1st respondent had to be protected from possible suits. It was necessary to insulate the interests of the shareholders from a F serious loss of the capital fund of the 1st respondent. The events show that everyone acted in panic. Looking at the circumstances outlined by learned counsel for the appellant not individually but as part of a continuing story, it is clear that there was no malicious intent on the part of the 9th respondent to denude the 1st G respondent of its business. In short, the kind of conduct which the House of Lords frowned upon in the *Scottish Co-operative* case is absent here. What appears to have been uppermost in the minds of the relevant respondents is to ensure that the selling agents were dealt with in a reasonable way so as to avert possible H litigation. Learned counsel for the appellant argued that the stated purpose for the formation of Newco and the migration of the agents to it was nothing more than a lame excuse. The 9th respondent and those associated with it could easily enough have continued with the core business of the 1st respondent whilst I dealing with the selling agents in the manner in which they were dealt with. There was no need to have the business conducted

through Newco at all. On hindsight that might well appear to be a reasonable suggestion. But one must recall the reality of the situation that faced the relevant respondents in the aftermath of the award of 16 August 2002. Simultaneous steps had to be taken and parallel courses of action had to be run. There was, as we have already said, no assurance that all the selling agents would agree to waive any claim they may have had. At the same time, those agents that did agree had to be accommodated on new terms. It was a matter of pure commercial judgment well within the province of the concerned respondents. So long as they acted *bona fide* and in the interests of the 1st respondent and its shareholders, commercial decisions of this nature are well beyond the court's purview. And of this we are quite satisfied, that the steps taken by the relevant respondents, in particular the 9th respondent, were with the object of protecting the interests of the 1st respondent and its shareholders.

[12] We may add here two matters which we consider relevant. First, there is an admitted fact that the shareholders in the 1st respondent were offered shares in Newco. The appellant declined to take up the offer. Second, there is the offer to buy out the appellant. Now this conduct taken together with all the other relevant facts and circumstances points to an intention not to harm the 1st respondent or its shareholders.

[13] The third ground of complaint as constituting an act of oppression is the fact that the 9th respondent terminated the long-standing area agency agreement it had with the 1st respondent. The submission here is that the agreement was not terminable save for cause. Here, no cause had been provided as the 1st respondent had at no time acted in breach of the agreement in question. Now there are two answers to this submission. The first is provided by the facts and circumstances already adumbrated that followed hotfoot upon the arbitration award of 16 August 2002. No useful purpose will be served by repeating them here. Once Newco had been established and the 1st respondent completely insulated, the purpose of the area agency agreement ceased to exist. Its termination was a mere consequence of the restructure that had already been set in motion following the extraordinary general meeting of 24 June 2003. In a case of this sort, one has to look at the evidence in the round and not in isolation. Second, it is not quite correct to

say that the 1st respondent was not acting in breach of the area agency agreement. To recall, the commission payable under that agreement was 27 per cent. The appellant wanted it reduced to 4 per cent and wanted the 1st respondent to recover the balance in the hands of the 9th respondent. The court's sanction to do all this was being sought by way of the petition presented in this case. So, in reality, what the appellant wanted was a revisit of cl. 11 by the 1st respondent. That would, in our respectful view, amount to a violation of the terms of the area agency agreement.

[14] The real issue in this appeal is whether, based on the totality of the evidence presented to the High Court, a reasonable tribunal properly directing itself would have concluded that there was oppression or rather oppressive conduct leveled against the appellant. That question we would answer in the negative. In our judgment, the case put forward by the appellant in the court below fell far short of the standard required by the authorities to which we have already referred. In these circumstances, we find ourselves in agreement with the High Court in the orders that it made. The appeal is accordingly dismissed. The appellant must pay the costs of the respondents incurred in this court. The orders of the High Court are affirmed. The deposit in court shall be paid out to the 2nd and 8th respondent to account of their taxed costs. Each party shall be entitled to present its separate bill for taxation and each bill shall admit of a separate item for getting-up.